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In The

Supreme Court of the United States

October Term, 1994

ZELLA HININGER,

Petitioner,

vs.

CAN-AM INDUSTRIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal courts, sitting in diversity jurisdiction, may overrule the substantive law of the forum state's highest court, and deprive litigants of a substantive remedy recognized by the forum state?

2. Whether federal courts, sitting in diversity jurisdiction, may fail to follow *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938) and its constitutional mandates?

PARTIES TO THE PROCEEDING

The petitioner is Zella Hininger, Individually and as Personal Representative of the Estate of Thurlo Hininger, a/k/a Ted Hininger. The respondent, Can-Am Industries, Inc., appears in its corporate capacity.

For clarity, references to the parties are by "Hininger" and "Can-Am".

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OPINIONS BELOW

The opinion of the court of appeals (App. 1-14) is reported at 23 F.3d 124. The opinion and judgment of the district court (App. 15-37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on 22 June 1994. The order on rehearing was entered on 29 July 1994. (App. 38-39). The order on motion for leave to file petition for rehearing en banc was entered on 12

September 1994. (App. 40). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the interpretation of the Tenth Amendment to the United States Constitution, which states:

> The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X. This case also involves this Court's decision in *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938).

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

Hininger filed an action against Can-Am under common law theories of negligence and breach of warranty, as well as under the Texas Deceptive Trade Practices Act.[1]

Determining that it must apply the law of the forum state, the district court held that Texas law would govern all claims asserted by Hininger against Can-Am. Following a jury verdict favoring Hininger, the district court partially granted Can-Am's Motion for Judgment As a

[1] TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1987).

Matter of Law, limiting Hininger's recovery to the negligence claim. (App. 35).

Can-Am appealed the district court's choice of law decision to the United States Court of Appeals for the Fifth Circuit. The court of appeals, *sua sponte;* raised the issue of whether lost profits are recoverable for common law negligence in Texas. In a published opinion, the Fifth Circuit answered this question in the negative. (App. 4-6).

FACT STATEMENT

Hininger. The Hininger family has operated a custom grain and seed harvesting business since 1979. They harvest crops in numerous states including Texas. The Hiningers operated Case combines purchased from Parmer County Implement Company in Friona, Texas. In October 1988, four new Case combines were purchased from Parmer County Implement pursuant to a sales contract. No contracts were executed with Can-Am.

Can-Am. Can-Am is the exclusive manufacturer of wheels used on Case combines. The wheels are prone to fail. Can-Am's negligence in manufacturing the wheels forms the basis of Hininger's negligence claim.

1989 Harvest Season. The 1989 harvest season began in Arizona and California in May. By September the Hiningers were harvesting in Idaho when the main drive wheels cracked on all of the newly purchased combines, rendering them useless. Only three replacement wheels could be found in the continental United States.

Replacement wheels did not arrive until after the harvest season was over. As a result, the Hiningers were

forced to end their harvest season early. The 1989 wheel failures cost the Hiningers $70,340 in lost income and expenses.

1990 Harvest Season. The replacement wheels also failed. Every wheel cracked within three days in September 1990. The Hiningers' combines were inoperable for ten to fourteen days while replacement wheels were delivered from around the country. The Hiningers again lost income and incurred expenses totaling approximately $46,500.

REASONS FOR GRANTING THE PETITION

The court of appeals' opinion amplifies a growing conflict among the circuits. The split concerns application of substantive state law determining the availability of damages for economic losses caused by common law negligence.

The Fifth Circuit failed to follow the mandate of the Supreme Court of Texas which had held that negligence *will* support damages for economic losses. *Nobility Homes of Texas, Inc. v. Shivers,* 557 S.W.2d 77, 78, 83 (Tex. 1977) (emphasis added). This failure to apply substantive state law ultimately brings into question the continued viability of the *Erie* doctrine.

The decision of the Fifth Circuit stands in sharp conflict with the Eleventh Circuit's construction of the same Texas Supreme Court decision on the identical question of substantive Texas state law. The Eleventh

Circuit correctly interpreted Texas law as permitting economic recovery in negligence cases. *Stewart & Stevenson Serv., Inc. v. Pickard*, 749 F.2d 635, 640-41 (11th Cir. 1984). A district court sitting in the Eighth Circuit also applied Texas law to permit recovery of economic loss under a claim of negligence. *Held v. Mitsubishi Aircraft Int'l*, 672 F. Supp. 369, 374-75 (D. Minn. 1987).

The conflict appeared when the Tenth Circuit consciously declined to follow the only Texas Supreme Court precedent speaking directly to the issue. The court of appeals held that the Texas Supreme Court's language affirming the right to recover economic losses caused by negligence was mere dicta. The court recognized "the split among federal circuits interpreting this aspect of Texas law." *Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc.*, 24 F.3d 125, 129-30 (10th Cir. 1994).

The opinion by the Fifth Circuit in the instant case only deepened the conflict. Relying upon cases grounded in contract, rather than negligence, the court reached the same conclusion as the Tenth Circuit, apparently without recognizing the split among the circuits or that it was rejecting the Texas Supreme Court's *Nobility Homes* decision. *Hininger v. Case Corp.*, 23 F.3d 124, 125-27 (5th Cir. 1994); (App. 4-6).[2]

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[2] Case was not a party at trial or on appeal. Can-Am was the appellee before the court of appeals.

A. The Erie Doctrine.

This Court, in *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), declared that state law is to be applied in diversity cases, except in matters governed by the Constitution or Acts of Congress. The Court stated that "[w]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern . . . [t]here is no federal general common law." *Id.* at 78, 822, 1194.

In *Erie*, the Court reasoned that by failing to apply state law, the federal courts had invaded rights which are reserved by the Constitution to the several states. *Id.* at 79-80, 823, 1195. Federal courts exercising diversity jurisdiction are, therefore, required to enforce state law and state policy, because the federal courts are, in effect, acting as another court of the state. *Angel v. Bullington*, 330 U.S. 183, 191, 67 S.Ct. 657, 662, 91 L.Ed. 832, 838 (1947). Thus, United States Judges are to be guided by the law of the state, regardless of whether that law is declared in a statute or by its highest court. *Erie*, 304 U.S. at 78, 58 S.Ct. at 817, 82 L.Ed. at 1195.

In this case, the Supreme Court of Texas has spoken. The court of appeals was not required to speculate or guess. It need only apply settled state substantive law. This it declined to do.

B. The Recovery of Economic Loss.

The Texas Supreme Court has held that economic loss is recoverable in a cause of action for negligence:

> We hold that Shivers may not recover his economic loss under section 402A of the Restatement (Second) of Torts *but may recover such loss under* the implied warranties of the Uniform Commercial Code and *the theory of common law negligence.*
>
> Consumers have other remedies for *economic loss* against persons with whom they are not in privity. One of these remedies is a cause in *negligence.*

Nobility Homes, 557 S.W.2d at 78, 83 (emphasis added).

Thus, while rejecting recovery of economic loss in strict products liability, Texas has clearly recognized the right to recover economic loss in negligence. This holding has never been overruled, modified, or questioned by later decisions of the Supreme Court of Texas.

Economic loss can be direct or consequential. *Id.*; *Hininger*, 23 F.3d at 126, n. 1; (App. 5). Consequential economic loss includes all indirect loss, such as loss of profits resulting from an inability to make use of the defective product. *Nobility Homes*, 557 S.W.2d at 78, n. 1. Accordingly, in Texas lost profits are recoverable for negligence, as are the costs of repair. *Id.*

Hininger's specific loss of profits and repair costs fall squarely within the definition of economic loss as enunciated by the forum state's highest court in *Nobility Homes*. The Tenth Amendment and the *Erie* doctrine required the court of appeals to recognize and apply the holding of the

Supreme Court of Texas. *Erie*, 304 U.S. at 78, 58 S.Ct. at 817, 82 L.Ed. at 1195.

C. The Conflict Among Circuits.

Purporting to apply Texas law, the court of appeals for the Fifth Circuit and Tenth Circuit have held that economic loss is not recoverable for common law negligence. *Hininger*, 23 F.3d at 125-26; (App. 4-6); *Rocky Mountain Helicopters*, 24 F.3d at 129-30. By contrast, the Eleventh Circuit followed the decision in *Nobility Homes* in holding that economic loss is recoverable for common law negligence. *Stewart & Stevenson*, 749 F.2d at 640-41. A Minnesota federal district court is in accord. *Held*, 672 F.Supp. at 374-75. There is a clear and growing conflict among courts in the Fifth, Eighth, Tenth, and Eleventh Circuits. The split among the circuits was specifically recognized by the Eleventh Circuit in *Rocky Mountain Helicopters*, 24 F.3d at 129.

The reason for the conflict lies in some courts' misunderstanding and misapplication of Texas law when damage remedies are derivative of the cause of action. There is a dichotomy between cases in which injury results from a breach of contract and those involving pure negligence. In the former, the action sounds in contract alone. In the latter, the action sounds in tort alone.

The analysis can become complicated when an injury is compensable in both contract and tort. Overlapping remedies have resulted in the emergence of hybrid theories of recovery known as "contorts." In such cases, it can be unclear whether (1) the breach of contract, the tort, or

both, caused the injury, and (2) whether the law of contract, tort, or both, provide the remedy.

Here, of course, neither contract nor contort rights and remedies need be addressed. There was no contract forming the basis of Hininger's relationship with Can-Am. This is a garden variety tort case. It is controlled by the rule announced in *Nobility Homes*; economic loss is recoverable upon a finding of negligence.

Although that principal of Texas law was settled by the state's highest court, confusion has resulted because some federal courts have applied contract or contort remedies to cases of pure negligence. The conflict among the circuits was caused by the courts' failure to make the fundamental distinction of which theory of recovery forms the basis for the claim in cases arising under Texas law. Such is the case before this Court.

1. The Eleventh and Eighth Circuits.

The Court of Appeals for the Eleventh Circuit and a United States District Court sitting in the Eighth Circuit, properly read and applied Texas law. In both cases, the claim sounded in tort alone and the conduct fell outside the duties imposed by a commercial contract. The remedy did not sound in contract even though contracts governed other aspects of the parties' relationship. Rather, the remedy sounded in tort.

For example, in *Stewart & Stevenson Serv., Inc. v. Pickard*, 749 F.2d at 638, 640-41, Marine Dynamics purchased motorboat engines from Stewart and Stevenson

pursuant to a written contract. The engines malfunctioned and Marine Dynamics suffered a loss of profits. After holding that the contract failed to disclaim or limit Stewart & Stevenson's negligence liability, the Eleventh Circuit properly applied Texas law to permit recovery for lost profits and repair costs. *Id.* at 639.[3]

Likewise, in *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F. Supp. 369, 372, the plaintiff purchased an aircraft from Mitsubishi Aircraft International (Aircraft International) pursuant to a commercial contract. Mitsubishi Heavy Industries, Ltd. (Heavy Industries) designed and manufactured the airplane but was not a party to the contract. *Id.* The airplane crashed killing all aboard. Suit was brought against Aircraft International and Heavy Industries for negligent design seeking recovery for economic loss. *Id.*

The district court recognized that Texas was in a minority position in allowing recovery for economic loss in negligence. It nonetheless applied Texas law. The court held that the plaintiffs could recover economic loss from both defendants for negligence. *Id.* at 374-75, 379, 384. The court's analysis was straight-forward: Heavy Industries was not in privity of contract with any of the parties; consequently, Heavy Industries was liable in tort. *Id.* at 379.

---

[3] The court reversed the award of economic loss, because Marine Dynamics failed to meet its burden of proof. *Id.* at 647-50.

Aircraft International, however, presented a more complex issue because it had privity of contract with the plaintiffs. The contract purported to immunize Aircraft International from negligence claims arising out of the sale, use, or operation of the aircraft. *Id.* at 384. Because the contract clause did not refer to losses arising from negligent design, the court permitted the plaintiffs to pursue an action for negligent design in order to recover economic loss. *Id.* at 377, 384-85.

In each instance, the court's accurate characterization of the asserted claim enabled it to properly apply Texas law. Both courts held that economic loss is recoverable in tort.

2. The Fifth and Tenth Circuits.

The Fifth and Tenth Circuits have reached the opposite conclusion, holding that under Texas law, purely economic loss is not recoverable in an action for negligence. *Hininger*, 23 F.3d at 125-27 (App. 4-6); *Rocky Mountain Helicopters*, 24 F.3d at 129-30. Both circuits relied upon precedent in which the economic injury was the subject matter of a written contract. *Id.* However, neither the parties in *Hininger* nor the parties in *Rocky Mountain Helicopters* had contracts with their defendants; hence, a threshold mischaracterization of the claim resulted in denial of a remedy expressly sanctioned by the Supreme Court of Texas.

The Tenth Circuit failed to distinguish between Texas cases sounding in contract and those based on negligence. *Rocky Mountain Helicopters*, 24 F.3d at 130. Accordingly, the court found it necessary to make an *Erie* guess, speculating that the Texas Supreme Court would reject recovery of economic loss in a claim for negligence. *Id.* To make that assumption, the court was required to dismiss the Texas Supreme Court's holding that economic losses were recoverable in negligence as dicta. *Id.* It is, of course, difficult to imagine a clearer pronouncement of state law than a simple declarative statement by the state's highest court on the issue in dispute.

The Fifth Circuit followed a similar analysis in *Hininger*. Rather than dismissing as dicta the Texas Supreme Court's pronouncement that economic losses are recoverable in negligence, the Fifth Circuit simply ignored it. Instead, the court relied upon its own decision in *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Electric Corp.*, 844 F.2d 1174, 1177-78 (5th Cir. 1988). *Arkwright*, however, addressed economic loss that was the subject of a sophisticated, extensively negotiated, commercial contract. *Id.* at 1176-77. While the *Arkwright* court's analysis of Texas law was correct in the limited context of contract damages, its application to the negligence claim in *Hininger* was incorrect. Here, there was no contract between Hininger and Can-Am. This is a negligence case.

The Texas Supreme Court distinguishes between cases sounding in contract and in tort. The conflict among the circuits arises because the Fifth and Tenth Circuits failed to distinguish between cases seeking contract damages and those seeking damages in tort. By misapplying

Texas law, the circuits are depriving litigants of a long held remedy recognized by Texas courts. By failing to award economic losses, the Fifth Circuit has ignored settled Texas law in favor of federal common law. In so doing, the Fifth and Tenth Circuits have violated *Erie R.R. Co. v. Tomkins*, as surely as if they had turned a blind eye to the Tenth Amendment. As a result, the Hiningers were denied a recovery they could have obtained in a Texas state court.

CONCLUSION

For the reasons and authorities set forth, it is respectfully submitted that the Petition for A Writ of Certiorari should be granted.

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APPENDIX

Zella HININGER, Individually and as personal Representative of the Estate of Thurlo Hininger, a/k/a Ted Hininger, Plaintiff-Appellee/Cross-Appellant,

v.

CASE CORPORATION,

et al, Defendants,

Can-Am Industries, Inc., Defendant-Appellant/Cross-Appellee.

No. 93-1577.

United States Court of Appeals,
Fifth Circuit.

June 22, 1994.

Rehearing Denied July 29, 1994.

Purchaser of combine brought products liability action against manufacturer of combine wheel, seeking recovery for lost profits, lost contracts and repair costs. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., awarded purchaser recovery on negligence claims but denied recovery on implied warranty claims. Manufacturer appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) negligence claims were barred by "economic loss" rule, and (2) combine purchaser could not assert implied warranty claim for economic loss against manufacturer of component part.

Affirmed in part; reversed and rendered in part.

A.W. SoRelle, III, James W. Wester, Underwood, Wilson, Berry, Stein & Johnson, Amarillo, TX, for appellant.

John H. Lovell, Joe L. Lovell, Garner, Stone & Lovell, Amarillo, TX, for appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBERG, DAVIS, and DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In this products liability action, plaintiff seeks to recover her lost profits and repair costs resulting from the failure of combine wheels manufactured by defendant and supplied to Case for incorporation into the combines. The district court awarded plaintiff recovery on her negligence claims and denied her recovery on her implied warranty claims. Because we conclude that her negligence claims are barred by the "economic loss" rule, we reverse that part of the court's judgment. Because we conclude that she cannot assert an implied warranty claim for economic loss against Can-Am, we affirm that part of the court's judgment.

I.

Zella and Thurlo Hininger operated a custom grain and seed harvesting business. In January 1989, the Hiningers purchased four combines from Parmer County Implement Company ("Parmer") in Friona, Texas. In September 1989, while working in Idaho, the Hiningers had trouble maintaining air pressure in the drive wheel tires.

As a result, the combines were rendered inoperable, causing the Hiningers to experience downtime and suffer losses which the jury found to total $70,340.

The manufacturer of the combines, Case Corporation ("Case"), replaced two of the drive wheels in the fall of 1989 and replaced the other six in April 1990. The replacement wheels, however, began to crack around the bolt holes in September 1990. As a result, the Hiningers again experienced downtime and suffered losses, which the jury found to total $46,500. The original and replacement wheels were manufactured by Can-Am Industries ("Can-Am") in Illinois and were delivered to Case in Illinois. The Hiningers had no contact with Can-Am in connection with the purchase of the combines.

On May 6, 1991, Mrs. Hininger filed suit in her individual capacity and as representative of her husband's estate, seeking recovery on theories of negligence, strict liability, breach of warranty, and violation of the Texas Deceptive Trade Practices Act ("DTPA"). Mrs. Hininger sought damages for lost profits, lost contracts, and repair costs from Parmer, Case, Can-Am, and Case Credit Corporation resulting from the failure of the combine wheels.

In August 1992, Mrs. Hininger settled with all of the defendants except Can-Am. The district court then ruled that Texas law applied to her tort claims, as well as to her contract claims. Following a trial in January 1993, the jury found for Mrs. Hininger on her breach of warranty and negligent manufacturing claims. However, in response to Can-Am's motion for judgment n.o.v., the district court

limited Mrs. Hininger's recovery to her negligence claims.

II.

A.

Can-Am argues first that the district court erred in applying Texas law to Mrs. Hininger's tort claims. Can-Am asserts that Idaho and Illinois have the most significant contacts with this case, and that their laws would not allow Mrs. Hininger to recover her lost profits and repair costs in tort. Because Mrs. Hininger does not contest this interpretation of Idaho and Illinois law and because we conclude below that Texas law also disallows the recovery of such damages in tort, we need not decide whether the district court erred in applying Texas law. *See* Eugene F. Scoles & Peter Hay, *Conflict of Laws* 17 (1984) (" 'false conflict' exists when the potentially applicable laws do not differ").

B.

Can-Am argues that the district court erred in allowing Mrs. Hininger to recover her lost profits and repair costs resulting from Can-Am's negligence in manufacturing the combine wheels. For the reasons that follow, we agree with Can-Am's argument and therefore reverse this part of the court's judgment.

In *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex.1977), the Texas Supreme Court held that a purchaser of a defective mobile home could not recover the difference between the unit's reasonable market value

and its purchase price from the manufacturer based on a strict liability theory. In so holding, the court adopted the "economic loss" rule, which requires plaintiffs to recover their economic losses resulting from a defective product in contract rather than in tort.[1] The court explained that the Uniform Commercial Code was "drafted specifically to govern commercial losses and obviously provides the proper remedies to recover such losses." *Id.* at 80; *see generally* Marshall S. Shapo, *The Law of Products Liability* ¶ 27.01 et seq. (1987); J. Hadley Edgar, Jr. & James B. Sales, Texas Torts and Remedies § 40.04[3] (1994).

In *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Electric Corp.*, 844 F.2d 1174, 1177-78 (5th Cir.1988), we held that, under Texas law, a plaintiff cannot recover economic losses resulting from a defective product based on a negligence theory. In that case, a blade in an electrical turbine broke, causing extensive damage to the turbine. For purposes of our decision, we

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[1] As the court explained, economic losses can be either direct or consequential:

> Direct economic loss may be said to encompass damage based on insufficient product value; thus, direct economic loss may be "out of pocket" – the difference in value between what is given and received – or "loss of bargain" – the difference between the value of what is received and its value as represented. Direct economic loss also may be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product.

Notability Homes, 557 S.W.2d at 78 n. 1 (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum.L.Rev. 917, 918 (1966)).

assumed the manufacturer's negligence, but denied plaintiff recovery because it was only seeking to recover its economic loss. See *id.* We concluded that the magistrate judge had properly granted defendant's summary judgment motion on the ground that: "Texas law does not permit recovery under a negligence theory for economic loss resulting from damages to a defective product." *Id.*[2]

In deciding *Arkwright-Boston*, we relied on the Texas Supreme Court's decision in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex.1986). In that case, plaintiffs sought recovery for a defective home. They complained of defendant's negligent supervision of the construction of the home. In concluding that plaintiffs could not recover punitive damages, the court held that:

> The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone.

Id. at 618; *see also Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex.1991) ("When the only loss or damage is to the subject of the contract, the plaintiff's action is ordinarily on the contract."); *see generally* William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 Tex.Tech L.Rev. 477 (1992).

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[2] The United States Supreme Court, in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), surveyed the law in this area and adopted a similar rule for admiralty cases: a purchaser cannot recover its economic losses resulting from a defective product from a manufacturer in tort.

However, because Can-Am did not manufacture the combines, but rather supplied the wheels to Case to incorporate into the combines, the question remains: Can Mrs. Hininger recover her economic losses from Can-Am in tort?

Initially, it is clear to us that most of the reasoning that led the Texas Supreme Court to reject an action in tort against a manufacturer of a finished product for economic loss supports the denial of a similar action against a component supplier. Thus, we believe that a rejection of Mrs. Hininger's tort action against Can-Am is consistent with the Texas Supreme Court's reasoning in *Nobility Homes*.

In *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir.1988), *cert. denied*, 488 U.S. 1030, 109 S.Ct. 839, 102 L.Ed.2d 971 (1989), the Third Circuit addressed the same question and concluded that, under Pennsylvania law, a plaintiff cannot recover her economic losses resulting from a defective product from a component supplier in tort. In that case, plaintiffs alleged that their potato crop had failed because the seed potatoes they purchased that spring had been treated with a defective sprout suppressant. *Id.* at 1048. The grower from whom plaintiffs purchased the potatoes had used a sprout suppressant manufactured by defendant. *Id.* at 1049.

In analyzing plaintiffs' suit against the manufacturer of the sprout suppressant, the court noted that defendant was "a component supplier who is remote from the plaintiff in the production and distribution chain." *Id.* at 1053. The court gave a number of reasons for rejecting plaintiffs' tort claims against the component supplier. First, if

plaintiffs had a warranty claim against the component supplier, they should be required to pursue that claim in order to preserve "private risk allocation" so that "manufacturers of products or components thereof will not be exposed to open-ended and indefinite liability." *Id.* at 1054. Second, even if plaintiffs did not have a valid warranty claim against the component supplier, they would still have "a warranty claim against the immediate seller that . . . will give the purchaser the benefit of its bargain." *Id.* Finally, the court concluded that, even if plaintiffs could not assert a valid warranty claim against their immediate seller, they still should not be allowed to recover against the component part supplier in tort because:

> Implicit in the [economic loss rule] is the policy judgment that in a commercial context the possibility of an inadequate recovery . . . does not justify permitting a tort recovery that will allow a purchaser to reach back up the production and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions comprising that chain.

Id.; see also Nathaniel Shipping, Inc. v. General Elec. Co., 920 F.2d 1256, 1265 (5th Cir.1991) (economic loss rule applies in admiralty despite lack of privity); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir.1987); *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla.1993).

We find the Third Circuit's reasoning to be persuasive and are convinced that the Texas Supreme Court would adopt this position. We therefore conclude that the district court erred in allowing Mrs. Hininger to recover

her lost profits and repair costs from Can-Am based on a negligence theory.

C.

On cross-appeal, Mrs. Hininger contends that the district court erred in dismissing her implied warranty of merchantability claim. The district court held that:

> In this case, it is clear that the bargained-for expectation of Plaintiff was a complete and functional Case combine. Plaintiff points to no evidence that the Hiningers expected anyone other than Case and/or Parmer to resolve their problems with the defective wheels. Both Case and Parmer took affirmative action in an attempt to resolve the wheel problems; Can-Am was not consulted and did not participate in the repair attempts. Plaintiff cites no Texas cases extending liability to a component part supplier in the circumstances of this case. For this reason, the Court concludes that there is no contractual liability to Plaintiff for Can-Am.

Because we agree that Mrs. Hininger cannot assert an implied warranty claim for economic loss against Can-Am, we affirm the district court's dismissal of this claim.

Under Texas law, a warranty of merchantability is implied in every contract for the sale of goods by a merchant, unless the warranty is properly excluded or modified. V.T.C.A. Bus. & C. § 2.314(a). The warranty of merchantability may be disclaimed or modified by the merchant, provided that: (1) the disclaimer is in writing; (2) it is conspicuous; and (3) it expressly mentions the term "mechantability." V.T.C.A. Bus. & C. § 2.316(b).

A number of states make privity a requirement for asserting an implied warranty claim for economic loss. *See* Barkley Clark & Christopher Smith, *The Law of Product Warranties* ¶ 10.03[3] (1984 & 1993 Supp.); Robert E. Cartwright & Jerry J. Phillips, *Products Liability* § 2.26 (1986). However, in *Nobility Homes*, The Texas Supreme Court held that: "a manufacturer can be responsible, without regard to privity, for the economic loss which results from his breach of the Uniform Commercial Code's implied warranty of merchantability." 557 S.W.2d at 81. Thus, the Texas Supreme Court dispensed with the privity requirement and permitted a purchaser to assert an implied warranty claim for economic loss against a remote manufacturer of a finished product.

Today's case, however, presents a related, but different question: Can a purchaser go upstream from the manufacturer of the finished product and assert an implied warranty claim for economic loss against a manufacturer of a component part? Although we find no Texas authorities directly addressing this question, we believe that the experienced Texas district judge in this case properly distinguished between the manufacturer of the finished product and the component part manufacturer. She reasoned that the Hiningers bargained for a "complete and functional Case combine," not wheels and axles and all the myriad components that make up the combine. Thus, the district court concluded that the Hiningers had no expectation that Can-Am or any of the other manufacturers of unbranded components would resolve any problem they might experience with the

combines.[3] *See also* William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort*, 44 U.Miami L.Rev. 731, 789-93 (1990).

In a general maritime law case dealing with a related problem, we reached a similar conclusion: "The buyer ordinarily has no interest in how or where the manufacturer obtains individual components. The buyer is usually interested in the quality of the finished product and is content to let the manufacturer decide whether to do all the work or delegate part of it to others." *Shipco 2295*, 825 F.2d at 929.

Moreover, we believe that the reasoning of *Nobility Homes* supports the district court's conclusion that Mrs. Hininger cannot assert an implied warranty claim against Can-Am. In explaining its holding, the *Nobility Homes* court recognized that a number of states still require a purchaser to show privity with the defendant to assert an implied warranty claim for economic loss, but that:

> Courts which have declined to overturn the privity requirement in warranty actions for economic loss . . . fear that holding manufacturers liable for economic loss imposes unlimited and unforeseeable liability upon manufacturers. These fears are justified when manufacturers are held strictly liable for economic loss under the terms of section 402A of the Restatement (Second) of Torts. But, these fears are not justified

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[3] Mrs. Hininger does not contend that she and her husband had any contact with Can-Am, that Can-Am's name was on the wheels, or that Can-Am advertised its product to the public at-large. *See Spring Motors Distrib., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660, 676-77 (1985).

> when manufacturers are held liable by the Uniform Commercial Code because the Code, itself, protects manufacturers against unlimited and unforeseeable liability. First, the Uniform Commercial Code allows manufacturers to restrict their liability by the exclusion or modification of both implied and express warranties. . . . Second, manufacturers' liability is restricted by the very terms of the Uniform Commercial Code sections which furnish the consumer's implied warranty remedies. . . .

557 S.W.2d at 82.

Thus, the court in *Nobility Homes* reasoned that a purchaser cannot maintain a strict liability action for economic loss, in part, because of the unlimited and unforeseeable liability it would impose on manufacturers. However, the court concluded that a manufacturer's ability to limit its warranty exposure permitted it to protect itself against unlimited and unforeseeable liability and distinguished the warranty action from the strict liability action. We read this as an important justification for the *Nobility Homes* court's decision to dispense with the privity requirement and allow a purchaser to assert an implied warranty claim for economic loss against a remote manufacturer.

Clark v. DeLaval Separator Corp., 639 F.2d 1320 (5th Cir. Unit A 1981), illustrates our point. In that case, we applied *Nobility Homes* and held a remote manufacturer liable for the ultimate purchaser's economic loss based on the manufacturer's breach of the implied warranty of merchantability. We observed that a remote manufacturer can effectively disclaim its warranty liability either by including a disclaimer in the materials that accompany

the product or by insisting that the retailer include the manufacturer's disclaimer in the sales contract with the consumer. *Id.* at 1324.

However, as Judge Logan observed in *Patty Precision Products Co. v. Brown & Sharpe Manufacturing Co.*, 846 F.2d 1247 (10th Cir.1988), it may be difficult or even impossible for a component supplier to disclaim its warranty liability:

> The difficulty of notifying ultimate purchasers is exacerbated if the manufacturer has produced a component rather than a finished product. Components are often hidden within the product, making it difficult or impossible for the manufacturer to notify ultimate purchasers by posting disclaimers on the product itself. Further, while the manufacturer before us, G.E., may be economically powerful enough to require someone like Brown & Sharpe to notify all purchasers of the warranty limitation, the typical component part manufacturer will be selling to a larger entity which it cannot reasonably be expected to control.

Id. at 1257 (Logan, J., concurring in part and dissenting in part).

In sum, we believe that the Texas Supreme Court would distinguish between the manufacturer of the finished product and the component supplier because of the component supplier's inability to disclaim its warranty liability effectively. This distinction, together with the Hiningers' lack of any expectation that Can-Am, the upstream component supplier, would respond to defects in the finished product, lead us to agree with the district

court that Mrs. Hininger has no implied warranty action against Can-Am.[4]

III.

For the reasons stated above, we affirm the district court's dismissal of Mrs. Hininger's implied warranty claims, but reverse the district court's judgment awarding Mrs. Hininger recovery on her negligence claims and render a take-nothing judgment in favor of Can-Am.

AFFIRMED in part; REVERSED and RENDERED in part.

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[4] In light of this finding, we need not address the viability of Mrs. Hininger's DTPA claim. *See La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex.1984) (DTPA "does not create any warranties; therefore any warranty must be established independently of the act.").

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

ZELLA HININGER, Individually and as Personal Representative of the Estate of Thurlo Hininger a/k/a Ted Hininger,	§	CIVIL ACTION CAUSE NUMBER
PLAINTIFF,	§	2:91-CV-0094-J
v.	§	
CA[N]-AM INDUSTRIES, INC.,	§	(Filed May 6, 1993)
DEFENDANT.	§	

ORDER DENYING DEFENDANT'S MOTION FOR JNOV AND GRANTING IN PART PLAINTIFF'S MOTION FOR JUDGMENT

Before the Court is Defendant Cam-Am Industries, Inc.'s motion, filed February 4, 1993, for judgment notwithstanding the verdict, and Plaintiff's motion, also filed February 4, 1993, for judgment on the jury's verdict. For the following reasons, Defendant's motion is denied and Plaintiff's motion is granted in part as follows.

I. Background

In this case, Plaintiff asserted that Defendant Can-Am breached an implied warranty of merchantability owed to Plaintiff and that Can-Am was negligent in its manufacture and/or design of wheel rims for Case Corporation. Plaintiff took her warranty claim to the jury

under the Texas Deceptive Trade Practices Act (DTPA), and her negligence claim under Texas common law. Plaintiff alleged only economic damages: damage to tires mounted on the wheel rims and lost profits in the years 1989 and 1990.

Plaintiff alleged her damages were caused by drive wheel malfunctions on combines assembled by Case Corporation (Case) and purchased from Parmer County Implement Co., Inc. (Parmer) in Texas.[1] Defendant Can-Am manufactured the wheels at issue in Quincy, Illinois, shipped them F.O.B. Quincy to Case's manufacturing plant in Wisconsin, who then attached them to combines. Can-Am knew the purpose for which Case used its wheels, and knew that Case would place its combines into the stream of commerce for sale in various areas of the United States.

Case sent combines to Parmer for sale to consumers in Texas. Plaintiff, traveling to Texas from Arizona, traded in old combines and purchased four new Case combines from Parmer. Plaintiff used these combines in her existing commercial harvesting business in the Western United States. The drive wheels broke down on a farm in Idaho in 1989 and again in 1990. Replacement wheels were sent to Plaintiff in Idaho through Parmer.

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[1] Plaintiff is a citizen of Arizona. Defendant Case is a Delaware corporation with its principle place of business in Wisconsin. Defendant Parmer is a Texas corporation with its principal place of business in Parmer County, Texas. Defendant Can-Am is an Illinois corporation with its principal place of business in Quincy, Illinois. The Case defendants and Parmer settled with Plaintiff prior to trial.

Defendants Case and Parmer settled with Plaintiff; only Can-Am remained at trial. The parties filed a joint exhibit of stipulated facts that are relevant to the issues raised by these motions. The Court adopts those stipulated facts in this Order.[2]

At trial, the jury found for Plaintiff on both her breach of warranty and negligent manufacturing claims, and found that her lost profits caused by the 1989 wheel failures were $66,500.00, plus an additional $46,000.00 in 1990. The jury found Plaintiff's loss due to repair or replacement of tires was $3,840.00 in 1989 and $500.00 in 1990. The jury also found Plaintiff's negligence proximately caused a portion of the damages suffered. Comparative causation percentages in 1989 and 1990 were 2% and 5%, respectively, for Plaintiff and 64% and 49% for Can-Am.

Can-Am elected prior to submission of the case to the jury to have any damages awarded Plaintiff reduced by the sum of all settlements pursuant to § 33.012(b) of the Tex. Civ. Prac. & Rem. Code (Vernon 1986). This is a dollar-for-dollar credit. After the close of Plaintiff's case, Can-Am filed a written motion for a directed verdict.

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[2] The Court notes that Defendant Can-Am admitted prior to trial that it manufactured the allegedly defective wheels used by Case on Plaintiff's combines – the wheels that are the subject of Plaintiff's action. Can-Am also admitted that it reasonably expected some of its wheels would travel through the stream of commerce into Texas. Those admissions answered the questions left open in the Court's order denying Can-Am's motion to dismiss for lack of personal jurisdiction, and answer issues raised again in Defendant motion for JNOV.

Can-Am asserted 112 grounds for its motion, which was denied.

II. Standards Governing Post-trial Motions

A renewed motion for judgment as a matter of law, formerly known as a motion for judgment notwithstanding the verdict, is governed by Rule 50(b) of the Federal Rules of Civil Procedure. The standard is the same as the standard for granting a motion for judgment as a matter of law made during trial, formerly known as a motion for a directed verdict made at the close of a plaintiff's case. *See Moran v. Raymond Corp.*, 484 F.2d 1008, 1014 (7th Cir. 1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed.2d 490 (1974); *Juhnke v. EIG Corp.*, 444 F.2d 1323, 1325 (9th Cir. 1971); Fed. R. Civ. Pro. 50. *See generally* Wright & Miller, *Federal Practice & Procedure 2d* § 2521 *et seq.* (1973) (Wright & Miller).

"A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Notes of Advisory Committee on Rules, 1991 Amendments to Fed. R. Civ. Pro. 50(b) (citing *Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d Cir. 1989)). *Accord Nottingham v. General Am. Communications Corp.*, 811 F.2d 873, 877-78 (5th Cir.), *cert. denied*, 484 U.S. 854 (1987). Can-Am is, therefore limited in its motion for post-verdict judgment to the grounds asserted within its motion for a directed verdict.[3]

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[3] Neither Plaintiff nor Can-Am assert errors in the Court's jury charge. Should a losing party contest the Court's charge to the jury, "the test is not whether the charge was not faultless in

III. Contentions of the Parties

Plaintiff moves for judgment on the jury's negligence and breach of warranty findings. As to negligence, Plaintiff asserts that the evidence is sufficient for recovery of her 1989 and 1990 damages under two negligence theories – negligent design and negligent manufacturing. Plaintiff further asserts that the evidence at trial was sufficient to show that she is entitled to her damages on her DTPA claim that Can-Am breached its implied warranty of merchantability. Plaintiff additionally asserts that there is no evidence as to Defendant's reasonable and necessary attorney's fees, and moves the Court to disregard the jury's response to Question No. 9 on Defendant's fees and expenses.

Plaintiff asserts that if she is allowed recovery of her property and economic damages under her breach of warranty claim then the jury's comparative causation findings should be disregarded. She asserts that comparative causation applies only to her negligence claim, and because her percentages (2% and 5%) are less than Can-Am's (both of which, 64% and 49%, are greater than 20%) she is not barred from recovery in tort. She asserts that any "negligence only" recovery should be reduced by the percentages found to be attributable to her.

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every particular but whether the jury was misled in any way." *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 386 (5th Cir. 1980). The Court need not consider a late-voiced objection concerning the adequacy of its instructions to the jury. Fed. R. Civ. Pro. 51. Absent fundamental error, failure to properly object to an instruction in a charge precludes review of the objection. *Farrar v. Cain*, 756 F.2d 1148 (5th Cir. 1985).

Plaintiff asserts that since Can-Am elected a dollar-for-dollar credit for Case's and Parmer's settlement, which she asserts is a total of $65,000.00, this entire amount should be applied to reduce her total damages. Plaintiff states that Can-Am had the burden to show the total value of all prior settlements, and that there is no evidence her asserted amount of $65,000.00 in total settlement credit is incorrect. She asserts that any error in finding the full settlement credit to be $65,000.00 has been waived by Can-Am's failure to submit this factual question to the jury.

Can-Am, in addition to its prior arguments regarding an asserted lack of minimum contacts and on choice of law issues, argues 5 grounds in its motion for judgment in its favor. First, Can-Am asserts that Plaintiff waived any implied warranties owed by Can-Am in the retail sales contract executed with Case Corporation. Second, that Plaintiff is not a consumer under the Texas DTPA as to Can-Am. Third, that there is no evidence showing lack of merchantability in Can-Am's wheels. Fourth, that there is no evidence of negligent manufacturing by Can-Am. Fifth, that the wheel failures were solely caused by Plaintiff's negligence and there is no evidence of negligence by Can-Am.

Can-Am's contentions regarding choice of law were ruled on by written order entered prior to trial. No facts developed at trial change the Court's conclusion on these issues. Further, both admissions by Can-Am made prior to trial and the evidence admitted at trial show sufficient minimum contacts for jurisdiction over Can-Am in this forum. The Court therefore again denies Can-Am's motions on these issues.

The Court finds there was sufficient evidence admitted at trial to deny Can-Am's "no evidence" points argued in the third, fourth and fifth grounds stated above. This leaves only the issue of a waiver or disclaimer of Can-Am's implied warranty of merchantability, the first grounds asserted above, and the issue of whether Plaintiff is a consumer under the Texas DTPA as to Can-Am, the second issue stated above. Only these two issues raised by Can-Am, and the issues asserted by Plaintiff, will be discussed below.

Discussion and Analysis

A. DTPA Liability

Can-Am's breach of its implied warranty of merchantability went to the jury in the context of a DTPA claim. Plaintiff asserts that Can-Am is "inextricably intertwined" with Case and Parmer in the sale of the farm equipment only because it manufactured the defective component part giving rise to this suit, not because of services it provided. Plaintiff asserts that Can-Am may be found liable under the DTPA on an intertwined liability theory. Can-Am denies that this is a actionable theory of DTPA liability.

"The term 'inextricably intertwined' finds its recent origin in connection with the DTPA in *Knight v. International Harvestor Credit Corp.*, 627 S.W.2d 382, 389 (Tex. 1982)." *Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 305 (Tex. 1988). However, the *Knight* case had nothing to [sic] "with derivative or vicarious liability' " and " 'inextricably intertwined', is not an

additional theory of vicarious liability under the DTPA." *Qantel, supra,* 761 S.W.2d at 305.[4]

Turning to the standard theories of liability under the Texas DTPA, section 17.46 of the DTPA declares "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce" unlawful. "A plaintiff establishes his standing as a consumer in terms of his relationship to a *transaction*, not by a contractual relationship with the defendant." *Kennedy v. Sale*, 689 S.W.2d 890, 893 (Texas. 1985) (emphasis added). "The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint." *Id.*

The DTPA does not require that the Plaintiff as a "consumer" to be in the same chain of title as the person who furnished the good or service on which the complaint is based, nor does it impose "any similar privity requirement." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 541 (Tex. 1981). Also, "a person need not seek or acquire goods or services furnished by the defendant to be a consumer as defined in the DTPA." *Id.* at 541. *Accord Stagner v. Friendship Development Co., Inc.*, 620 S.W.2d 103 (Tex. 1981) (DTPA has no vertical privity requirement).

However, the mere breach of a contract provision – without more – does not constitute a false, misleading, or

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[4] "In *Knight*, this court held that when two parties are 'inextricably intertwined' to a certain degree they may be held equally responsible for wrongful conduct. However, that statement was made in the context of establishing whether the plaintiff was a consumer with respect to the financing company as well as the seller of the truck involved in the action." *Qantel, supra,* 761 S.W.2d at 305.

deceptive action such as would violate § 17.46 of the DTPA. *Duro-Wood Treating Co. v. Century Forest Indus., Inc.*, 675 F.2d 745, 756 (5th Cir.), *cert. denied*, 459 U.S. 865 (1982); *Smith v. Baldwin*, 611 S.W.2d 611, 614 (Tex. 1981); *Chrysler Corp. v. Schuenemann*, 618 S.W.2d 799, 807 (Tex. Civ. App. – Houston [1st Dist.] 1981, no writ); *Coleman v. Hughes Blanton, Inc.*, 599 S.W.2d 643, 646 (Tex. Civ. App. – Texarkana 1980, no writ); *Holloway v. Dannenmaier*, 581 S.W.2d 765 (Tex. Civ. App. – Fort Worth 1979, writ dism'd). Misconduct occurring before or after the transaction which forms the basis of the complaint, by any party who sought to enjoy the benefits of the transaction, is actionable by a consumer under the DTPA. *See Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983).

The transaction in this case was the sale of the Case combine to Thurlo Hininger. The parties have stipulated that Can-Am was not involved in that sale. Can-Am is a component part manufacturer only; it was not involved in any way in the sale of the equipment to Plaintiff. It provided no post-sale services. Any benefit to Can-Am from the sale to Plaintiff is remote; Can-Am had already received the full benefit of its sale to Case and in fact received this benefit regardless of whether a sale to Plaintiff occurred.

Plaintiff does not have a "inextricably intertwined" DTPA cause of action against Can-Am in the facts of this case. There being no "inextricably intertwined" theory available to Plaintiff,[5] in order to prevail on her DTPA

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[5] This theory might have been utilized to find DTPA liability for Defendants Case Corporation and Case Credit Corporation, an issue this Court need not reach, but *Knight* cannot be used to stretch liability to Can-Am.

claim she must have an actionable claim under one of the standard theories of liability.

Defendant disputes its liability under standard DTPA liability theories, and asserts that Plaintiff is a not [sic] consumer as to Can-Am as defined by the Texas DTPA.[6] For Plaintiff to have a viable DTPA cause of action against Can-Am there must evidence of misconduct by Can-Am, misconduct done for its own benefit, and misconduct over and above mere breach of the implied warranty of merchantability.

Plaintiff points to Can-Am's negligent design and manufacturing, but the negligent manufacturing here does not rise above mere negligence or breach of contract. It does not rise to that level of misconduct required to be actionable under the Texas DTPA.[7]

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[6] Before an individual may recover under the DTPA, he must establish that he is a "consumer" as defined by the Act. *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980). The DTPA defines a consumer as "an individual . . . who seeks or acquires by purchase or lease, any goods or services." Tex. Bus. & Com. Code Ann. § 17.45(4) (Texas DTPA) (Vernon 1987).

[7] Plaintiff sought no services from Can-Am that would give rise to DTPA liability. "Services" are defined in the DTPA as "work, labor or service purchased or leased for use." Tex. Bus. & Com. Code Ann. § 17.45(2) (Tex. DTPA) (Vernon 1987). "Services" in the DTPA context were further defined by the Texas Supreme Court "as: action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental toward some objective." *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 179, 174 (Tex. 1980) (citing *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962)).

Even though the Texas DTPA must be liberally construed,[8] Plaintiff has no DTPA cause of action against Can-Am. Her motion for judgment on this claim must therefore be denied.

B. Implied Warranty of Merchantability

Breach of an implied warranty is usually a contract cause of action. Plaintiff preserved her implied warranty claim both as a DTPA and a contract claim in the amended pretrial ordered entered in this case. Whether the jury was instructed on this claim as a DTPA or contract claim is not determinative of the question whether Plaintiff can now recover on her warranty claim in contract. The elements are the same under either a contract or DTPA theory, and the jury found breach of this implied warranty by Can-Am.

"Under Texas law, a manufacturer of a product may be held liable to an ultimate purchaser of that product for economic loss which results from the manufacturer's breach of the implied warranty of merchantability of § 2.314 [of the Texas Bus. & Com. Code], without regard to privity of contract between the parties." *Clark v.*

"This definition describes 'services' in terms of 'action,' 'conduct,' 'performance' and 'deeds'." *Riverside, supra* at 174. "All these synonyms demonstrate that services includes [sic] *an activity* on behalf of one party by another." *Id.* (emphasis in original).

[8] The Texas DTPA provisions "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against . . . unconscionable actions." Tex. Bus. & Com. Code Ann. § 17.44 (Texas DTPA) (Vernon 1987).

DeLaval Separator Corp., 639 F.2d 1320, 1322 (5th Cir. 1981) (citing *Nobility Homes of Texas. Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977)). "To recover from a manufacturer on a theory of implied warranty under Texas law, one must establish that there is a defect in the object sold as it left the manufacturer." *Clark, supra*, 639 F.2d at 1326. "The defect may be one of design, material, or manufacture." *Id.*

The implied warranty of merchantability under § 2.314 may be disclaimed or modified by a seller pursuant to § 2.316 if the disclaimer expressly mentions the term "merchantability' " is in writing, and is conspicuous. *Clark, supra*, 639 F.2d at 1322-23; Tex. Bus. & Com. Code § 2.316(b) (Vernon 1986).[9] Such a disclaimer must expressly mention by name the manufacturer or other parties disclaiming this warranty. *Clark, supra*, 639 F.2d at 1324. The buyer's actual knowledge of the disclaimer may eliminate the conspicuousness requirement, which is measured by an objective, not a subjective, standard. *Cate v. Dover Corp.*, 790 S.W.2d 559, 561-62 (Tex. 1990).

Defendant Can-Am adequately disclaimed its implied warranty of merchantability to Case. Can-Am was not mentioned by name in Case's disclaimer to Plaintiff. The evidence at trial did not show Plaintiff's awareness of Can-Am's disclaimer to Case. However, this does not resolve the question. Whether a buyer under a sales contract for manufactured goods can recover on a cause

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[9] Implied warranties of merchantability and of fitness for a particular purpose may be disclaimed under the provisions of the Texas DTPA, if properly done. *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982).

of action for breach of an implied warranty against a component part manufacturer is an open question in Texas. There are no reported Texas cases dealing with this specific issue. Looking to cases on tort and contractual warranties gives some guidance.

Texas law does not allow recovery in tort on the basis of strict product liability where the damage is only to the property itself. In *Mid-Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 572 S.W.2d 308, 313 (Tex. 1978), a strict product liability and breach of implied warranty case with no personal injury issues, the Texas Supreme Court held that failure of a component engine valve in an airplane engine did not give rise to a strict product liability cause of action in tort because the part of the product that caused the damages to the plane caused only damages to the whole product, not to "other property" of plaintiffs. Where the damage is only to the property itself, Plaintiff's sole remedy is a breach of warranty action under the Uniform Commercial Code against the manufacturer of the airplane and/or its seller. *See id.*

Privity of contract between the buyer and the manufacturer is not a requirement in Texas for breach of warranty actions. In *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977), the court held that a buyer of a mobile home could bring a breach of the implied warranty of merchantability cause of action for economic damages, even absent privity of contract, against the manufacturer of the home. There were no component part manufacturers sued in *Nobility Homes*.

These two cases do not resolve the question presented in this case. Here we have a manufacturer who

supplied a relatively small part of a much larger machine. Courts in other states have addressed suits against component part manufacturers.

In a diversity action governed by state law, the Third Circuit held that Pennsylvania law does not permit recovery from component part suppliers under negligence or strict product-liability theories for economic losses resulting from defective products which damage only themselves. *King v. Hilton-Davis,* 855 F.2d 1047, 1050-54 (3rd Cir. 1988) (major failure of a potato seed crop due to application of a chemical coating designed to prevent premature germination). The Third Circuit concluded that the proper focus in such "component part" cases is the buyer's "bargained-for expectations." *See id.* at 1052. In support of this conclusion, the Third Circuit cited *East River Steamship Corp. v. Transamerica Delaval, Inc.*[10]

"In *East River* the plaintiffs and defendants were remote in the production and distribution chain and the defendant sold something less than the plaintiffs leased or purchased." *King v. Hilton-Davis, supra,* 855 F.2d at 1051."[T]he East River analysis dictates that where the purchaser of a defective product sues the manufacturer

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[10] The United States Supreme Court, in an admiralty case involving no personal injury claims, has held that "a manufacturer in a commercial relationship has no duty either under a negligence or strict products-liability theory to prevent a product from injuring itself." *East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 871, 106 S.Ct. 2295, 2302, 90 L.Ed.2d 865 (1986). The Court concluded that in such circumstances the buyer's sole remedy is a contractual breach of warranty action against the seller. *Id.,* 476 U.S. at 866-68, 106 S.Ct. at 2299-2300.

from whom he or she has purchased the product, rather than a supplier of components for the product, the relevant product is what the plaintiff bargained for and the remedy is limited to a contract-based recovery." *Id.* In this case, the purchaser has sued both the manufacturer and the supplier of component parts.

The Fifth Circuit in an admiralty case has stated the "[w]e see no rational reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed, or furnished by someone other than the final manufacturer." *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 929 (5th Cir. 1987). The Fifth Circuit concluded that in the context of a tort claim for economic loss, the "product" means "the finished product bargained for by the buyers" rather than the individual components of that product. *Id.* at 930. Plaintiff here is in effect seeking greater rights than are granted under Texas law.

In this case, it is clear that the bargained-for expectation of Plaintiff was a complete and functional Case combine. Plaintiff points to no evidence that the Hiningers expected anyone other than Case and/or Parmer to resolve their problems with the defective wheels. Both Case and Parmer took affirmative action in an attempt to resolve the wheel problems; Can-Am was not consulted and did not participate in the repair attempts. Plaintiff cites no Texas cases extending liability to a component part supplier in the circumstances of this case. For this reason the Court concludes that there is no contractual liability to Plaintiff for Can-Am.

Case's disclaimer of warranty to Thurlo Hininger is effective to eliminate any breach of the implied warranty of merchantability cause of action that Plaintiff had against Case. Plaintiff points to no Texas case holding Can-Am liable to Plaintiff on the same warranty for its component wheels. Despite the fact that Can-Am is not mentioned by name in Case's disclaimer, Plaintiff does not have a remedy against Can-Am. The course of dealings between the parties and the facts of this case do not evidence such bargained-for expectations.

Plaintiff's sole remedy for breach of warranty lay in her claims against Case and Parmer County, as manufacturer and retailer of the combine equipment. She does not have a contractual remedy against Can-Am as a component part manufacturer. Considering all of the cases cited above, she has no recovery in contract. The question remains, however, whether she has a viable negligence claim against Can-Am.

C. Negligence Claims

The evidence in this case is that Can-Am negligently manufactured its wheels to Case's specifications.[11] Because Can-Am manufactured the wheels only according to Case's design, without authority to approve, modify or reject the design, Plaintiff cannot recover against

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[11] This fact, without Can-Am's involvement in the sale or post-sale service, does not rise to that level of misconduct required for a DTPA claim against Can-Am. This negligence is separate and apart from any misdeed by Can-Am in the sale of goods to Plaintiff. It is actionable, if at all, in a common law negligence cause of action.

Can-Am for negligent design in this case. Despite Can-Am's assertions to the contrary, there is sufficient evidence of negligent manufacturing in this case.

In the alternative, Plaintiff moves for judgment on her negligent manufacturing claim. Can-Am asserts "no evidence" points against this claim in its motion. Can-Am has also asserted that it has disclaimed any such liability to Plaintiff in one or both of two manners: 1) in its disclaimer to Case, 2) in Case's disclaimer to Thurlo Hininger, or 3) via a combination of both.

A manufacturer can disclaim liability for negligence, but the contract language to that effect must be clear and unequivocal and the contract must be between parties of equal bargaining positions. *Allright, Inc. v. Elleridge*, 515 S.W.2d 266 (Tex. 1974). The contract between Case and Plaintiff does not clearly and unequivocally disclaim Can-Am's liability, if any, for negligent design or negligent manufacture of the wheels. Taking separately each of the disclaimers at issue here, and construing both together, the language at issue is not effective to disclaim Can-Am's liability to Plaintiff for its negligent design and/or manufacture of the wheels at issue.

The Case contract is between Case and Plaintiff; it does not mention Can-Am by name. Likewise, Can-Am's disclaimer is only between Case and Can-Am; it is undisputed that Plaintiff had no knowledge of this disclaimer at the time of sale. While the question of whether persons in the position of Can-Am may be third-party beneficiaries of a seller's disclaimer is not settled in Texas law, in the facts of this case this issue need not be addressed.

The jury found negligent manufacturing by Can-Am. Plaintiff points to evidence of negligence by Can-Am in both the design and the manufacturing of the 1989 and 1990 wheels. There is sufficient evidence of negligent manufacture of the 1989 and 1990 wheels by Can-Am. On this basis judgment should be entered for Plaintiff, if she has a viable cause of action for negligence under Texas law. *Nobility Homes* states that common law negligence is a viable cause of action by buyers for economic damages even absent privity. 557 S.W.2d at 83. *Mid Continent Aircraft, supra,* does not change this conclusion. The Court concludes that Plaintiff does have a tort cause of action in the facts of this case.

D. Damages

Plaintiff's $65,000.00 settlement with Case and Parmer did not leave her whole. Even after full credit to Can-Am for Case's and Parmer's settlement, Plaintiff suffered $51,840.00 in actual damages according to the jury's findings. Plaintiff incurred these damages in 1989 and 1990. Her damages are not speculative in nature; they could be ascertained with a reasonable degree of certainty and exactness. *See McBrayer v. Teckla, Inc.*, 496 F.2d 122, 127 (5th Cir. 1974); *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 348 (1955); *First Title Co. v. Garrett*, 802 S.W.2d 254, 260-61 (Tex. App. – Waco 1990, no writ); *Copenhaver v. Berryman*, 602 S.W.2d 540, 543-44 (Tex. Civ. App. – Corpus Christi 1980, writ ref'd n.r.e.).

All of Plaintiff's damages were fully accrued prior to trial. Under Texas law she is entitled to prejudgment interest on this amount. Because Plaintiff is entitled to

recover on a property damage cause of action, the issue arises as to the point in time prejudgment interest starts on her damages. Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 § 6(a) provides that plaintiffs must recover prejudgment interest in property damage cases at the rate of 10% per annum, simple interest, beginning 180 days after the first of: a) receipt by the defendant of written notice of a claim, or b) the date suit was filed. Plaintiff asserts that in this case there are three possible points in time:

1) 180 days after her first notice of claim letter to Can-Am,[12]

2) 180 days after the date suit was filed,[13] or

3) 180 days after Can-Am first received written notice of her claim, which in this case was sent to Can-Am from Case.[14]

Plaintiff does not mention a possible fourth date; 180 days after Plaintiff's second written DTPA demand letter to Can-Am.[15]

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[12] This letter did not expressly mention the Texas DTPA. It did not comply with all of the statutory requirements of a demand letter under the Texas DTPA. Defendant pointed this out in pre-trial pleadings, and Plaintiff's Texas counsel sent a second DTPA demand letter to Can-Am.

[13] Suit was filed on May 6, 1991: 180 days after this date is November 6, 1991.

[14] Can-Am first received written notice of Plaintiff's claims from Case on September 5, 1990. Plaintiff states it has located no authority determining whether Plaintiff's notice of claim must be from Plaintiff, or whether notice from a third party is effective under Texas law.

[15] Plaintiff's Texas counsel sent a demand letter that complies with the statutory requirements of the Texas DTPA. This

Plaintiff's first notice of claim letter was sent to Can-Am by her Arizona counsel; it has been stipulated that this letter was received "shortly after" January 22, 1991. Plaintiff suggests that this letter was received by Can-Am no later than February 1, 1991; 180 days after this date is July 30, 1991. It is not disputed that this letter is notice to Can-Am of a claim regarding its wheels. Therefore 180 days after this date is the correct point in time that prejudgment interest starts on the property damages found by the jury.

Plaintiff is correct that only an award of damages on a negligence theory requires reduction for Plaintiff's percentage of negligence. Plaintiff is also correct that Can-Am is entitled to full credit for the $65,000.00 settlement from Case and Parmer. *See* Tex. Civ. Prac. & Rem. Code §§ 33.001(a), 33.012(a), 33.013(b) & 33.014 (Vernon 1986). Plaintiff is not entitled to her attorney's fees and other expenses of litigation.[16]

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latter was dated after suit was filed. Because the Court awards no DTPA damages, the date of Can-Am's receipt of this second letter is not relevant.

[16] In diversity cases, state rather than federal law governs issuance of an award of attorney's fees. *Shelak v. White Motor Co.*, 636 F.2d 1069 (5th Cir. 1981). In Texas, attorney's fees are not recoverable in tort actions, *see* 16 Tex. Jur. 3d Costs § 38 (1981), except by way of punitive damages. *Id. Accord Houghton v. Wholesale Electronic Supply*, 435 S.W.2d 216, 220 (Tex. Civ. App. – Waco 1968, writ ref'd n.r.e.); *Fitz v. Toungate*, 419 S.W.2d 708, 710 (Tex. Civ. App. – Austin 1967, writ ref'd n.r.e.) (no recovery of attorney's fees except as part of punitive damages in tort).

IV. Conclusions

Defendant's motion for judgment is denied.

Plaintiff's motion for judgment is granted on her negligence cause of action and is denied on her claims regarding a breach of the implied warranty of merchantability.

Plaintiff is instructed to tender a proposed judgment in accordance with this opinion to the Court and to opposing counsel on or before 15 (fifteen) days from the date of entry of this Order.

It is SO ORDERED.

Signed this the 5th day of May, 1993.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

ZELLA HININGER, Individually and as Personal Representative of the Estate of Thurlo Hininger a/k/a Ted Hininger,	§	CIVIL ACTION CAUSE NUMBER 2:91-CV-0094-J
PLAINTIFF,	§	
v.	§	
CA[N]-AM INDUSTRIES, INC.,	§	
DEFENDANT.	§	

FINAL JUDGMENT

(Filed May 19, 1993)

The above-styled action having come on for a trial before the jury, the jury having rendered its verdict, and the Court having ruled on all post-trial motions, it is

THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff Zella Hininger, Individually and as Personal Representative of the Estate of Thurlo Hininger, a/k/a Ted Hininger, have judgment against Defendant Can-Am Industries, Inc. as follows:

(1) Damages in the amount of Forty-eight Thousand One Hundred Eight Dollars and Twenty Cents ($48,108.20); plus

(2) Prejudgment interest at the rate of 10% simple interest calculated per annum on this amount from July 30, 1991, to and

including May 17, 1993 in the total amount of Eight Thousand Six Hundred Forty-five Dollars and Eighty Cents ($8,645.80);

It is FURTHER ORDERED, ADJUDGED and DECREED that post-judgment interest on the total of these two amounts accrue as provided by law at the rate of 3.25% from May 17, 1993 until the date this Judgment is paid in full.

It is FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff recover her taxable costs of court.

Judgment in this amount reflects the fact that Defendant Can-Am Industries, Inc. has been granted proper credit in the total amount of Sixty-five Thousand Dollars and No Cents ($65,000.00) as a result of Plaintiff's settlement with other Defendants. No further credit is allowed. *See Sisters of Charity of the Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 116-18 (Tex. App. – Austin 1992, writ denied).

It is FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff is granted all writs and process for the collection and enforcement of this Judgment as necessary, for which let execution issue.

All relief not granted herein is DENIED.

It is SO ORDERED, ADJUDGED and DECREED.

Signed this 18th day of May, 1993.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1577

ZELLA HININGER, Individually and as Personal Representative of the Estate of Thurlo Hininger, a/k/a Ted Hininger,

Plaintiff-Appellee
Cross-Appellant,

versus

CASE CORPORATION, ET AL.,

Defendants,

CAN-AM INDUSTRIES, INC.,

Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(Filed July 29, 1994)

Before GOLDBERG, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1577

ZELLA HININGER, Individually and as Personal Representative of the Estate of Thurlo Hininger, a/k/a Ted Hininger,

Plaintiff-Appellee
Cross-Appellant,

versus

CASE CORPORATION, ET AL.,

Defendants,

CAN-AM INDUSTRIES, INC.,

Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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(Filed Sept. 12, 1994)

ORDER:

IT IS ORDERED that appellant's motion for leave to file suggestion for rehearing en banc out of time is denied.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT
JUDGE